

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Claim No. 2007 Folio 1186



BETWEEN :-

THE OFFICE OF FAIR TRADING

-and-

Royal Courts of Justice

- (1) **ABBEY NATIONAL PLC**
- (2) **BARCLAYS BANK PLC**
- (3) **CLYDESDALE BANK PLC**
- (4) **HBOS PLC**
- (5) **HSBC BANK PLC**
- (6) **LLOYDS TSB BANK PLC**
- (7) **NATIONWIDE BUILDING SOCIETY**
- (8) **ROYAL BANK OF SCOTLAND GROUP PLC**

Transaction: 52287
Fee Code : COMM 1.5 07
Fee : £400.00
Operator : MANSFIELD, K
Dated : 05/10/2007 14:34:41
Payment Mtd:

Defendants

BARCLAYS' DEFENCE AND COUNTERCLAIM

DEFENCE

Introduction

- 1 References to paragraph numbers herein are to numbered paragraphs of the Particulars of Claim, unless stated otherwise.
- 2 For ease of reference, and save where otherwise appears, the Second Defendant (*Barclays*) adopts the abbreviations used in the Particulars of Claim.

3 Barclays reserves the right to plead further to the Particulars of Claim when they are properly particularised and/or clarified.

The OFT

4 Paragraph 1 is admitted as a summary of some of the powers of the OFT, the relevant provisions of the Act, the 1999 Regulations and the Directive, to which Barclays will refer for their full terms (including definitions), meaning and effect as necessary.

The Banks

5 It is admitted that Barclays is and operates as a bank, and provides (amongst other things) current account facilities to customers who are consumers within the meaning of Regulation 3 of the 1999 Regulations (and others).

6 As set out in more detail below, Barclays does so under its own name and, with effect from around October 2003 until about July 2007 (when all "Woolwich" personal current account customers became subject to Barclays' own terms), also did so under the trading names "*The Woolwich*" and "*Woolwich*".

7 Barclays does not admit the OFT's case against any other Defendant. This Defence is to be read as pleading only to the case against Barclays.

8 The last sentence of paragraph 2 is noted. Otherwise, this paragraph is admitted.

The 1999 Regulations

9 Paragraphs 3-7 are admitted as a summary of some of the provisions of the 1999 Regulations, to which Barclays will refer in full at trial for their precise terms, meaning and effect as necessary.

Terms and Conditions

10 Pursuant to the litigation agreement dated 25 July 2007 (referred to in paragraph 11) (*the Litigation Agreement*), Barclays has provided to the OFT

10.1 The personal current account agreement and price list currently (and which, as at 1 October 2007, will be) in force (*the Current Terms*); and

10.2 A representative selection of the historic personal current account agreements and price lists of a kind which are in dispute in the county court claims referred to in the Litigation Agreement (*the Historic Terms*),

for both “Barclays” and “Woolwich” accounts.

11 Save as aforesaid, paragraph 8 is admitted.

12 If and to the extent that paragraph 9 is intended to refer to Barclays, Barclays has identified and disclosed the documents which set out the terms and conditions of the relevant account. Save as aforesaid, paragraph 9 is not admitted.

Barclays Relevant Terms

13 It is admitted and/or averred that:

13.1 The Current Terms and Historic Terms for both “Barclays” and “Woolwich” customers provide or provided for the payment of fees and/or charges to Barclays for banking services arising out of and/or in connection with (amongst other things) a customer’s request for and/or use of overdraft services.

13.2 Such requests may be made informally and/or by conduct by the customer seeking to make a payment from the current account without

having sufficient funds in credit or a sufficient previously agreed overdraft facility to do so, on the basis of Barclays' published fees and/or charges for such overdraft services being applicable. In this Defence, Barclays refers to the terms which provide for fees and/or charges to be paid arising out of and/or in connection with such informal requests as the *Barclays Relevant Terms*.

13.3 Barclays has charged and/or charges some or all of the types of fee referred to generically in paragraph 10.1 and 10.2. The precise circumstances in which such fees are and/or have been payable (or not), and their nature, are set out in the Barclays Relevant Terms to which Barclays will refer in full at trial as necessary.

13.4 Such fees and/or charges, provided for by the Barclays Relevant Terms, are the price, remuneration and/or the consideration (or part thereof) for Barclays:

- (1) Providing and/or agreeing to provide the customer with a package of banking services, which include some or all of the following:
 - (i) the credit of deposits and other payments into the account;
 - (ii) the issue of cheque books;
 - (iii) the payment of cheques;
 - (iv) the setting up and payment of standing orders and direct debits;
 - (v) the use of cash machines;
 - (vi) the issue and use of debit and/or other electronic cards;
 - (vii) the use of and access to branch services and/or personnel;
 - (viii) the use of telephone and/or internet banking;
 - (ix) the provision of statements;

(x) overdraft services, including the consideration of an informal request for overdraft services made by the customer in the manner referred to in paragraph 13.2 above; the handling and processing of such a request, including (if appropriate) the return of the item unpaid and/or the notification of the item being unpaid; and the granting of overdraft facilities (if any) pursuant to such a request;

alternatively

(2) Considering an informal request for overdraft services made by a customer in the manner referred to in paragraph 13.2 above; handling and processing such a request (including, if appropriate, returning the item unpaid and/or notifying it as unpaid); and granting overdraft facilities (if any) pursuant to such a request, and/or agreeing to do so.

13.5 Further or alternatively, the provision of some or all of such overdraft services pursuant to and/or by way of acceptance of such informal requests is an integral part of the banker/customer relationship and/or constitutes part or all of the main subject matter of the banking contract pursuant to which the package of services (pleaded in paragraph 13.4(1) above) is provided and/or of any separate contract agreed in the manner referred to in paragraph 13.4(2) above. The fees and/or charges for such overdraft services form part of the definition of the main subject matter.

14 Save as aforesaid, paragraphs 10.1 and 10.2 are admitted.

15 The relevance of the interest provisions referred to generically in paragraph 10.3 (and included in the Schedules) is not understood in circumstances where the OFT do not contend that these provisions are "Relevant Terms and Charges", as it defines that term in paragraph 10. Save as aforesaid, paragraph 10 is denied.

16 Save as aforesaid, paragraph 11 is admitted.

17 As to paragraphs 12 to 14, the Schedules are noted, but they do not set out or summarise clearly or accurately the terms and conditions disclosed to the OFT and in particular the terms and conditions which provide for the fees and charges referred to generically in paragraph 10.1(a) and (b) and/or the Barclays Relevant Terms. Barclays will seek to agree revised Schedules with the OFT, failing which will serve its own Schedules.

Application of a test of unfairness

18 Paragraph 15 is not properly particularised but is in any event denied.

19 Without prejudice to the generality of the foregoing, and the burden of proof which rests on the OFT to prove each of the allegations pleaded in paragraph 15:

19.1 The Barclays Relevant Terms are in plain intelligible language and

19.2 The Barclays Relevant Terms do, and/or any assessment of fairness of them would, relate to the definition of the main subject matter of the contract(s).

19.3 The Barclays Relevant Terms do, and/or any assessment of fairness of them would, relate to the adequacy of the price or remuneration as against the goods or services supplied in exchange.

19.4 Barclays repeats paragraph 13 above.

20 Paragraph 16 is denied.

21 In the premises, by reason of Regulation 6(2) of the 1999 Regulations, the Barclays Relevant Terms are excluded from the applicability of the test of fairness set out in the 1999 Regulations and/or any assessment of the fairness

of them shall not relate to (*inter alia*) the level or amount of the fees and/or charges payable pursuant thereto.

22 Paragraph 17 is admitted.

The OFT's investigation

23 The second sentence of paragraph 18 is admitted but otherwise this paragraph is not admitted.

24 Paragraph 19 is admitted.

25 Paragraph 20 is not admitted.

26 Paragraph 21 is admitted.

27 Paragraph 22 is not admitted.

28 In the premises, it is denied that the OFT is entitled to the declaration sought or any relief.

COUNTERCLAIM

29 Barclays repeats its Defence.

30 If (which is denied) the Barclays Relevant Terms or any of them are not exempt from the test of fairness and/or fall to be assessed for fairness under the 1999 Regulations, then it is a necessary (but not sufficient) precondition to any such term and/or the fees or charges payable thereunder being shown to be unfair within the meaning of Regulation 5(1) of the 1999 Regulations that they be shown by the OFT to be contrary to the requirement of good faith.

- 31 Good faith, for the purposes of Regulation 5(1), means that the bank must, during the making of the contract(s) and/or when agreeing the term(s) in question, deal fairly and openly with its customers.
- 32 Further, in the premises, it is averred that the Barclays Relevant Terms are not capable of amounting to a penalty at common law including because they provide for the payment of remuneration for services supplied by Barclays in exchange, and not for payment of a sum of compensation by the customer for breach of a contractual duty owed to Barclays. Without prejudice to the generality of the foregoing, there is no such breach alternatively any such breach is waived by Barclays treating or agreeing to treat the customer's action in seeking to make a payment/withdrawal as a request for overdraft services and/or by Barclays considering and handling such a request.
- 33 In the premises, Barclays is entitled to and seeks declarations that:
- 33.1 The Barclays Relevant Terms are in plain intelligible language and (i) relate to the definition of the main subject matter of the contract; and/or (ii) relate to the adequacy of the price or remuneration as against the services supplied in exchange; and/or (iii) provide for payment of remuneration for services supplied by Barclays in exchange.
- 33.2 The Barclays Relevant Terms are excluded from an assessment for fairness under the 1999 Regulations and/or any assessment of the fairness of them shall not relate to the definition of the main subject matter of the contract and/or the adequacy (including the level or amount) of the price or remuneration as against the goods or services supplied in exchange.
- 33.3 The Barclays Relevant Terms are not capable of amounting to a penalty at common law.

33.4 It is a necessary (but not sufficient) precondition to the Barclays Relevant Terms being shown to be unfair within the meaning of Regulation 5(1) of the 1999 Regulations that they be shown by the OFT to be contrary to the requirement of good faith.

33.5 As to the true meaning of "good faith" for the purposes of Regulation 5(1) of the 1999 Regulations.

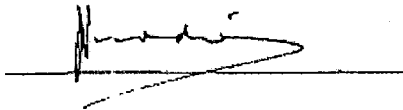
AND Barclays counterclaims

- (1) Declarations as aforesaid, alternatively in such terms as the Court thinks appropriate.
- (2) Further or other relief.

ANDREW MITCHELL

STATEMENT OF TRUTH

The Second Defendant believes that the facts stated in this Defence and Counterclaim are true



JONATHAN PEDDIE
Head of Litigation
Global Retail and Commercial Banking
Barclays Bank plc

Served this 28th day of September 2007 by Simmons & Simmons, of CityPoint, One Ropemaker Street, London EC2Y 9SS, Solicitors to the Second Defendant

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Claimant

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Defendants

BARCLAYS' DEFENCE AND
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